

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

2-28-77
77-6001 ^B

To be argued by
CARL T. SOLBERG

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-6001

JOSE BRUNO,

Plaintiff-Appellant,

—v.—

JOSEPH A. CALIFANO, JR., Secretary of Health,
Education and Welfare,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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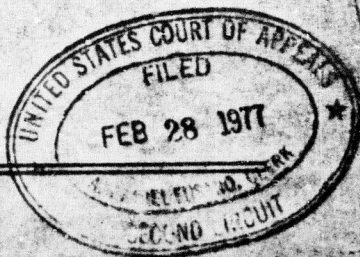


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-6001

JOSE BRUNO,

Plaintiff-Appellant,

—v.—

JOSEPH A. CALIFANO, JR., Secretary of Health,
Education and Welfare,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

The plaintiff-appellant Jose Bruno appeals from a judgment entered in the United States District Court for the Southern District of New York on October 14, 1976, pursuant to an Opinion of the Honorable Robert L. Carter, United States District Judge, dated October 8, 1976, granting summary judgment to the Secretary, defendant-appellee.*

* Joseph A. Califano, Jr. succeeded David Mathews, the defendant below, as Secretary of Health, Education and Welfare on January 25, 1977, and the caption of appellee's brief has been modified to conform to this state of facts pursuant to Rule 43(c) of the Federal Rules of Appellate Procedure.

Issues Presented

1. Did the District Court err in holding that the Secretary's decision that plaintiff was not disabled within the meaning of the Social Security Act was supported by substantial evidence?
2. Did the District Court err in finding that the Secretary's decision was based upon an examination of the whole record?
3. Did the District Court err in upholding the Secretary's finding that substantial gainful activity was available to plaintiff?
4. Did the Secretary fail to consider the cumulative effect of plaintiff's medical complaints?

Statement of the Case

A. Prior Proceedings

Mr. Bruno ("plaintiff") filed an application for a period of disability and for disability insurance benefits on March 22, 1974, alleging that he became unable to work on July 27, 1973 at age 32. (Tr. 67-70).^{*} He subsequently changed the alleged date of onset to November, 1973. (Tr. 33, 84). The application was denied initially on the ground that the plaintiff was not under a disability. On reconsideration, the Bureau of Disability Insurance of the Social Security Administration reached the same result on the basis of an independent review by a physician and disability examiner. (Tr. 75-76). Plaintiff re-

^{*} "Tr." refers to the transcript of the administrative record before the Social Security Administration, a certified copy of which was filed as part of the Secretary's answer to the complaint in the District Court pursuant to 42 U.S.C. § 405(g). Four copies of the transcript have been filed with this Court and designated as exhibits pursuant to Rule 30(e) of the Federal Rules of Appellate Procedure.

quested a hearing to review that decision (Tr. 27), and on March 28, 1975 a hearing was held before an Administrative Law Judge who considered the case *de novo*. Plaintiff, represented by counsel and aided by an interpreter, appeared and testified at the hearing, as did his wife and a vocational expert. The Administrative Law Judge found that the plaintiff was not under a disability, and his decision, dated April 9, 1975, became the final decision of the Secretary of Health, Education and Welfare when the Appeals Council, after considering additional evidence submitted by the plaintiff, approved the decision on June 27, 1975. (Tr. 6, 9, 134-37).

The action below was timely commenced on October 20, 1975.* Both parties filed motions for summary judgment. The Court denied plaintiff's motion and granted defendant's motion, holding, pursuant to 42 U.S.C. § 405 (g), that the final decision of the Secretary denying disability benefits to the plaintiff was supported by substantial evidence. The opinion of the District Court is reproduced in the Addendum at the end of this brief at 1a to 4a. Judgment was entered for defendant on October 14, 1976, and this appeal was commenced on December 6, 1976.

B. Statement of Facts

The plaintiff was born on August 19, 1940 in Puerto Rico, where he received a first grade education. (Tr. 35, 36, 67, 84). His work experience in Puerto Rico included cutting sugar cane and 13 years as a heavy equipment and heavy machinery operator. (Tr. 36-37).

The main factor upon which Mr. Bruno bases his claim of disability is a back problem which he attributes to an

* On February 4, 1975 the Appeals Council, at the request of Mr. Bruno's counsel, extended the time within which to file this action to October 27, 1975. (Tr. 6).

injury suffered on February 1, 1966, when a machine he was operating overturned and threw him. (Tr. 46, 78). He was hospitalized in Puerto Rico from February 1, 1966 to February 20, 1966 and was treated with bed-rest and medication. (Tr. 85). While no records of this treatment were produced by plaintiff, he complained of no subsequent injury, so it appears that this accident resulted in a compression fracture of the spine, the only significant spinal anomaly referred to in Mr. Bruno's more recent records.* (Tr. 114-15).

Following his hospital release on February 20, 1966, Mr. Bruno resumed his job as a heavy equipment operator. In 1968 he moved to New York and obtained work as a fork-lift operator in a soap factory, where his duties included lifting, packing and loading crates of soap. After four and a half years at this job, he went to work as a fork-lift operator at a factory warehouse, but was laid off on July 27, 1973. (Tr. 37-38, 77). He never attempted to find employment after he was laid off. (Tr. 38).

After receiving unemployment benefits for an unspecified period of time, Mr. Bruno applied for Social Security benefits on March 22, 1974. (Tr. 78). Plaintiff

* A compression fracture occurs when one vertebra is forced downward against the upper, forward margin of the next lower vertebra, fracturing it and compressing the fragments into a wedge-shaped deformity. This injury, the most common of vertebral fractures, occurs as a result of hyperflexion, or extreme forward bending, of the spine, as when a person falls and lands hard on his feet, jackknifing forward.

If no injury is caused to the spinal cord or nervous system, the injury is considered stable and may be treated with simple bed rest for 7-10 days, followed by use of a corset, exercise, and a return to normal activities. The treatment given plaintiff at the Puerto Rico hospital, plus the later X-rays and diagnoses, indicate that plaintiff probably sustained this type of injury. 1A Gray's *Attorneys' Textbook of Medicine* ¶¶ 14.11(1), 14.13(1) (3d ed. 1976).

explained on the application why he had stopped working, in the following words:

I hurt my back in 2/1/66. I was operating a machine and was thrown off of it. I fell down and hurt my back. I continued to work even though my back hurt me until 7/27/73 when I was layed off. My back and diabetes effected me to an extent where I have been unable to work at all now. (Tr. 78).

In response to the question, "When did your illness or injury finally prevent you from working?", plaintiff answered, "7/27/73"—the very same day that Mr. Bruno was laid off, not because of any disability, but, as he testified,

ADMINISTRATIVE LAW JUDGE: What happened, did they run out of work?

MR. BRUNO: Yes sir, they weakened out.* (Tr. 38).

When Mr. Bruno's application was denied, he applied for reconsideration on July 23, 1974, adding a complaint of high blood pressure. (Tr. 84). "My reasons [for re-

* Mr. Bruno's attorney, Mr. Bowers, later noticed the discrepancy between plaintiff's statements that he was laid off and that he became physically unable to work on the same day, in addition to the discrepancy suggested by plaintiff's testimony at the hearing that he did not learn of his diabetes, another factor in his alleged disabilities, until his hospitalization in November, 1973. (Tr. 45).

Mr. Bowers stated for the record that plaintiff "was laid off in July of '73, attempting to resume work subsequent to that and then finally ceased working altogether because of his disability in November 1973." (Tr. 32-33). This statement hardly corrected the record, because plaintiff himself testified under oath that he did not try to get work after July 27, 1973. (Tr. 38). No evidence in the record supports Mr. Bowers' statement that plaintiff attempted to find work after that date.

consideration] are: that my back condition has worsened and I cannot engage in any type of work activity." (Tr. 74).

This claim was denied on reconsideration on September 13, 1974, and four days later plaintiff requested a hearing. The hearing was held on March 28, 1975.

At, before and after the hearing, Mr. Bruno provided the Administrative Law Judge with medical evidence (Exhibits 1-20, Tr. 67-145) and testimony regarding the above complaints, adding new complaints of headaches and a heel impairment. In addition the plaintiff's wife testified, and the Administrative Law Judge heard the testimony of a vocational expert.

The Administrative Law Judge had before him the following medical evidence:

A report from Prospect Hospital, Bronx, New York, revealed that plaintiff was admitted on November 5, 1973 and discharged on November 20, 1973. The primary diagnosis was low back pain, apparently from an old fracture of the lumbosacral spine, for which he was given traction treatments. His secondary diagnosis was diabetes, which was reported to be controlled upon discharge. (Tr. 91).

An orthopedic surgeon, Dr. Dennis W. Wise (Tr. 97), submitted a "To Whom It May Concern" note, dated March 18, 1974, stating that plaintiff was disabled and was under treatment for back pain attributable to a fracture of the spine which occurred in 1966. Dr. Wise requested that plaintiff be considered for "social service disability" as he would probably be disabled for six more months. (Tr. 92). A second report by Dr. Wise, dated June 10, 1974, showed that plaintiff was treated on

February 28, 1974, March 18, 1974, and April 29, 1974. (Tr. 93, 138-39). The diagnosis was a healed compression fracture T12-L1 * with pain through the dorsal area and mild weakness of the left leg. Plaintiff was unable to bend forward or lift heavy objects. He could walk an unlimited number of blocks, and do unlimited sitting, but should not stand more than one hour. He could lift a maximum of 25 pounds. He should not do repetitious bending and stooping and should wear a back brace at all times, which he was reported to tolerate very well. Darvon Compound, a mild analgesic,** was prescribed for pain, and Valium for muscle spasm. Dr. Wise stated that plaintiff would always have symptoms and that should they become severe, a fusion should be carried out. (Tr. 93-95).

Dr. Frank Petersen-Baez, an internist (Tr. 110), provided a report, dated December 10, 1974, stating that plaintiff was unable to bend over or sit for any long period of time. X-rays of the thoracic-lumbar spine revealed a compression deformity of the anterior (i.e., forward) portion of the body of L1, most probably as a result of an old compression fracture at T12-L1, where the disc space is narrowed and osteophyte (bony) formations are seen in the margins of adjacent bodies. Dr. Petersen-Baez stated that plaintiff was unable to work. (Tr. 109).

* The vertebrae are designated by letter, for the region of the spine in which they are located (i.e., C-cervical; T-thoracic, sometimes D-dorsal; L-lumbar; S-sacral) and by number, indicating from top to bottom the individual vertebra within each region. Thus, claimant's L1 or first lumbar vertebra sustained a compression fracture when the next upper vertebra, T12, was compressed against it. The T12-L1 area is immediately below the rib cage. 1A Gray's *Attorneys' Textbook of Medicine* ¶ 11.00 (2) (3d ed. 1976).

** Darvon is prescribed for relief of "mild to moderate pain." Physicians Desk Reference, pp. 948-49.

Physical examination and progress notes submitted by the Hunts Point Multi-Service Center (hereinafter "Hunts Point"), Bronx, New York, for the period between January, 1974 and February, 1975 revealed that plaintiff visited the center approximately 27 times. (Tr. 111-30, 134-36, 138-45). His blood pressure varied from 160/100 to 134/70, to 120/56. An electrocardiogram of February 1, 1974 was normal (Tr. 124), and plaintiff's weight varied between 232 and 250 pounds. X-rays of July 30, 1974 of the spine showed a compression deformity of the anterior portion of the body of L-1, most probably as a result of an old compression fracture, and a narrowing of the T12-L1 disc space, with osteophyte formations in the margins of the adjacent vertebral bodies. According to the radiologist this X-ray showed Mr. Bruno's condition to be "unchanged" from that shown by the X-ray taken in January, 1974 (Tr. 114,120).^{*} As of July 30, 1974, plaintiff's condition was therefore reported to be stable and he was noted to be "comfortable on ambulation". (Tr. 140). A diet and analgesics were prescribed, although plaintiff was continually described as "obese", and as of October 31, 1974, it was noted that he "apparently doesn't follow his diet". (Tr. 141, 143, 145).

An X-ray of the left foot on December 10, 1974, showed moderate spur formation in the inferior (inner) aspect of the os calcis (heel), and small calcific fragments at the level of the plantar fascia (a thick fibrous layer sheathing the body under the skin). (Tr. 123). Heel pain which caused plaintiff to limp was treated successfully with injections. (Tr. 143).

^{*} Although the radiologist refers to an X-ray of "1-31-74", it is apparent that he is referring to the X-ray dated January 30, 1974.

Hunts Point's diagnoses included hypertension, diabetes mellitus, obesity, low back pain syndrome (Tr. 122), and headaches. (Tr. 118, 119, 135).

Submitted at the hearing on March 28, 1975 was a report from Dr. Serafin Izquierdo, a chiropractor, dated March 11, 1975, which stated that the doctor had examined plaintiff for acute pain in the lumbar spine radiating up toward the neck. (Tr. 132-33). Dr. Izquierdo found that coughing or straining produced pain in the low back area, and that all spinal motions were limited due to spasm and pain. On the basis of the examination and X-rays, Dr. Izquierdo stated that the prognosis for plaintiff was poor and that he would become progressively worse. (Tr. 132). X-rays of the entire spine and pelvis were taken and reported to Dr. Izquierdo by Dr. Jose A. Rivero, a radiologist. His letter to Dr. Izquierdo, dated February 27, 1975, reported the presence of an old compression fracture through the body of L1 with a wedge-shaped deformity. There was anterior bridging and spurring (bony formations) between D12 and L1. There was no evidence of dislocation, and the vertebral bodies were otherwise within normal limits. The inter-vertebral spaces, pedicles, transverse and spinous processes (other, posterior elements of the vertebrae) and sacro-iliac joints appeared normal. There was loss of the normal lordotic (forward) curvature in the cervical spine. No other osseous or articular pathology was demonstrated. (Tr. 133).

Admitted into evidence after the hearing was another report from Hunts Point dated April 2, 1975. (Tr. 134-36). The diagnosis was mature diabetes mellitus, essential hypertension, and exogenous (externally induced) obesity. Hypertension was controlled by medication, but the diabetes was very labile (unstable), and the blood

sugar still fluctuated; the diabetes was under moderate control. Obesity and low back pain syndrome were said to prevent plaintiff from engaging in strenuous and gainful activities. (Tr. 136). Blood pressure on March 14, 1975 was 130 90 and on March 31, 1975, was 140 90, and Mr. Bruno's weight was 245 and 256 pounds respectively on those dates. (Tr. 135).

Mr. Bruno testified at the administrative hearing that this back injury occurred in Puerto Rico in February, 1966 (Tr. 46), and that he came to New York City on September 17, 1968. (Tr. 35). He lives in a fourth-floor apartment with no elevator and used the subway to attend the hearing. (Tr. 36).

Plaintiff described his work experience. In Puerto Rico he operated heavy road construction equipment, as well as "[j]ust about everything that there was done in Puerto Rico—like taking cane, cutting cane." (Tr. 36-37). In New York he operated a high-low lift in a soap factory and later in a warehouse. (Tr. 37).*

Mr. Bruno testified as to his hospitalization at Prospect Hospital in November, 1973 for treatment of his back problem. (Tr. 39). He testified that he attended Hunts Point and regularly took 5 different pills prescribed there for him (Tr. 40-41), and that he was treated by a chiropractor, Dr. Izquierdo, about 6 times. (Tr. 40). Plaintiff stated he could not work because of his back, which prevented him from bending forward, pain in his left leg, and high blood pressure, and that he suffered from pain, headaches, dizziness, and diabetes. (Tr. 42-45).

* Plaintiff's application for benefits noted that in New York he also did general factory work, lifting, packing and loading boxes of soap. (Tr. 80).

Conversely, Mr. Bruno also testified that "[t]he pain begins to start and I have to bend to feel better or stand." (Tr. 46).

A vocational expert, Dr. Sidney Fishman (Tr. 99-108), a rehabilitation psychologist on the faculty of New York University's Post Graduate Medical School, School of Education and Health, and School of Fine Arts Professions (Tr. 49), testified at the hearing. He stated that he was familiar with the vocational potential of individuals with various impairments including hypertension, diabetes, and back impairments. (Tr. 51-52). He testified that he had studied the exhibits, including those submitted during the hearing, and had heard the testimony. (Tr. 51). In the event that plaintiff's impairments were actually as severe as plaintiff alleged, the vocational expert testified that plaintiff would be unable to work at any job. (Tr. 52). On the other hand, if plaintiff's impairments required only that he wear a back brace, alternate sitting and standing positions at will, and not bend or stoop while lifting more than 15 pounds, then (taking into account claimant's age, experience, education and training) there was a variety of sedentary jobs plaintiff could do which are found frequently in the metropolitan area and national economy. (Tr. 52-53). These jobs, Dr. Fishman testified, fall primarily into three categories: bench assembly and processing jobs, bench machine operation jobs and inspection jobs. (Tr. 53). Jobs in each category were enumerated and reported to be available in significant numbers in the New York City area (Tr. 54-55), all unskilled in nature with a short paid on-the-job training period. (Tr. 55).

Plaintiff's wife testified that she helped plaintiff with his socks and in tying his shoes, and that she usually accompanied her husband when he went out. (Tr. 63).

Following the hearing, the Administrative Law Judge determined that Mr. Bruno was not under a disability,

based on findings that plaintiff (a) "discontinued working on July 27, 1973 because of the lack of work and not because of any impairment", (b) "was not prevented by his impairments from engaging in substantial gainful activity, on or before the date of this decision, for any continuous period which lasted or could be expected to last for at least 12 months", and (c) "was not under a 'disability' as defined in the Social Security Act, at any time on or before the date of this decision". (Tr. 18).

The decision of the Administrative Law Judge shows a careful analysis of Mr. Bruno's complaints. First, he raised the complaint of hypertension. He noted that the record showed some early high readings, but that since June 14, 1974, the readings had been near normal. To be disabling, hypertension must be shown to have caused end-organ damage.* It had not, so the Administrative Law Judge found that plaintiff's hypertension "has never been severe enough to prevent him from working." (Tr. 15).

The Administrative Law Judge considered diabetes more significant. Again, however, the complications normally associated with a severe case were not present,** and the Administrative Law Judge found that diabetes had not prevented Mr. Bruno from working. (Tr. 16).

Regarding Mr. Bruno's complaints of back pain, the Administrative Law Judge noted that "[p]hysical examination, including the bones and joints, was essentially negative." (Tr. 16). He endorsed the findings of the orthopedist, Dr. Wise, and rejected the later, more restrictive opinions of the internist, Dr. Petersen-Baez, because the evidence did not show any deterioration of plaintiff's back condition subsequent to the date of Dr. Wise's opinion. (Tr. 16).

* 20 C.F.R. § 404.1501, Subpart P, App. 4.00C.

** *Id.*, App. 9.08B.

Specifically, the Administrative Law Judge found that:

" . . . [T]he claimant experiences back pain from time to time but not of any greater frequency or severity than that experienced by him from 1966 to July 27, 1973 during which time he operated heavy machinery on road construction and a fork lift in a factory and a warehouse. The administrative law judge also believes that the claimant is physically unable to lift objects in excess of 25 pounds, to bend more than a few degrees and to stand more than one hour at a time. However, the undersigned further believes that the claimant can sit for an unlimited period of time as long as he has an opportunity to stand from time to time to relieve any discomfort he might feel in his back." (Tr. 16). (Emphasis added.)

Although these findings obviated the need for vocational testimony, since it meant that plaintiff had failed to sustain his burden of proving himself incapable of his prior employment, the Administrative Law Judge nevertheless endorsed testimony that given plaintiff's dysfunctions, employment was available to him. The majority of the jobs cited were less strenuous than plaintiff's earlier jobs, but, significantly, the vocational expert thought Mr. Bruno capable of at least one of his previous functions, that of a packer. (Tr. 17, 53, 80).

ARGUMENT

POINT I

The Secretary's Decision Is Supported By Substantial Evidence and Should Be Affirmed.

A. The Scope of Review

Judicial review of the Secretary's decision is limited to a determination of whether the decision is supported by substantial evidence. 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389 (1971); *Gold v. Secretary of HEW*, 463 F.2d 38 (2d Cir. 1972); *Franklin v. Secretary of HEW*, 393 F.2d 640 (2d Cir. 1968); *Rivas v. Weinberger*, 475 F.2d 255 (5th Cir. 1973). If the Court finds that there is such evidence, the Secretary's decision must be upheld even if there is also substantial evidence for the plaintiff's position. *Howard v. Weinberger*, 489 F.2d 216 (5th Cir. 1974).

There need be no clear-cut preponderance in favor of the Secretary:

Where there is only a slight preponderance of the evidence on one side or the other, the Secretary's findings should be affirmed. *Selig v. Richardson*, 379 F. Supp. 594, 598 (E.D.N.Y. 1974). See also *Underwood v. Ribicoff*, 298 F.2d 850, 851 (4th Cir. 1962).

The reviewing court may not try the case *de novo* or substitute its findings for those of the Secretary, *Franklin v. Secretary of HEW*, *supra*. The Secretary's findings of fact, as well as the inferences and conclusions to be drawn from those findings, are conclusive, *Levine v. Gardner*, 360 F.2d 727, 730 (2d Cir. 1966), *McHale v.*

Mathews, 416 F. Supp. 1191, 1192 (S.D.N.Y. 1976), even in those instances where a reviewing court has suggested that the court's independent analysis of the evidence differed from the Secretary's analysis, *Reading v. Mathews*, 542 F.2d 993, 997 (7th Cir. 1976). Thus it is for the Secretary alone to resolve conflicts in the evidence, *Richardson v. Perales*, *supra*, and to pass upon the credibility of witnesses. *Dolan v. Celebrezze*, 381 F.2d 231 (2d Cir. 1967); *Kerner v. Celebrezze*, 340 F.2d 736 (2d Cir.), *cert. denied*, 382 U.S. 861 (1965).

B. Plaintiff's Burden of Proof

In order to establish entitlement to a period of disability insurance benefits, plaintiff has the burden of establishing that he was unable to engage in substantial gainful activity by reason of a physical or mental impairment, which can be expected to result in death or which has lasted or can be expected to last for a continuous period of at least 12 months. 42 U.S.C. § 405(g); *Franklin v. Secretary of HEW*, *supra*.

For the plaintiff to be disabled within the meaning of the Social Security Act, it is not sufficient that he merely have an impairment; such impairment must deprive him of his capacity to work to the extent that he is unable to engage in any substantial gainful activity. *Blalock v. Richardson*, 483 F.2d 773, 775 (4th Cir. 1972); *Henry v. Gardner*, 381 F.2d 191, 195 (6th Cir.), *cert. denied*, 389 U.S. 993, *rehearing denied*, 389 U.S. 1060 (1967).

When making a finding as to claimant's ability or inability to engage in any substantial gainful activity, there are four elements of proof for the Secretary to consider: (1) medical data and findings; (2) expert medical opinion; (3) subjective complaints; (4) claim-

ant's age, educational background, and work history. *Gold v. Secretary of HEW*, *supra*, 463 F.2d at 41 n.2.

If the claimant carries his burden of proof and shows (1) that he cannot perform the work required by his old job and (2) that the record has no evidence of his ability to engage in substantial gainful activity, *then* the burden shifts to the Secretary to show that given the claimant's limitations, there is other substantial gainful activity which he can perform. *Meneses v. Secretary of HEW*, 442 F.2d 803, 806 (D.C. Cir. 1971); *Gray v. Mathews*, 421 F. Supp. 364, 367 (N.D. Cal. 1976).

C. The Secretary's Findings and Their Evidentiary Bases

At the hearing on March 25, 1975, the plaintiff presented testimony relating to his allegations of disability due to a back condition, high blood pressure and diabetes. After considering "all the testimony at the hearing, the arguments made and the documentary evidence . . .", the Administrative Law Judge found that Mr. Bruno was not disabled by these ailments.

These findings are supported by substantial evidence and are entitled to affirmance. *See Kerner v. Celebrezze*, *supra*; *Celebrezze v. Bolas*, 316 F.2d 498 (8th Cir. 1963).

(1) High Blood Pressure

The Administrative Law Judge's finding that Mr. Bruno's high blood pressure did not disable him is supported by substantial evidence of near-normal readings

taken on June 14, 1974, July 29, 1974, and March 14, 1975, and by the total lack of evidence of any impairment to end organs (heart, brain, kidneys, eyes) which would warrant a finding of disability under the law. 20 C.F.R. § 404.1501, Subpart P, App. 4.00C.

(2) Diabetes

The Administrative Law Judge's finding that Mr. Bruno's diabetes has not prevented him from working is supported by evidence that this condition is controllable (Tr. 91, 121, 136), and the total absence of complications associated with a severe condition (neuropathy, acidosis or ophthalmologic impairment). 20 C.F.R. § 404.1501, Subpart P, App. 9.08 B.

(3) The Back Condition

(a) The Medical Evidence

The Administrative Law Judge's findings are directly supported by the opinion of Dr. Dennis W. Wise, the only orthopedist among the doctors who treated the plaintiff and a physician who treated Mr. Bruno prior to his application for benefits. (Tr. 95). Dr. Wise diagnosed Mr. Bruno's condition as "Compression fracture spine (healed)—back pain" and noted certain physical limitations (*see* p. 6107 *supra*). His prognosis: "Patient will have back symptoms on and off for remainder of life. If these become too severe—spine fusion should be carried out." (Tr. 95).*

* It is noteworthy that no spinal fusion has been carried out, and that none of Dr. Wise's non-orthopedic successors have referred to fusion. An impairment which is remediable cannot be considered as disabling for the purpose of an award of a period of disability or disability insurance benefits. *Hall v. Gardner*, 403 F.2d 32 (6th Cir. 1968); *Zeno v. Secretary of HEW*, 355 F. Supp. 657, 662 (D.P.R. 1972).

There were two differing medical opinions. An internist, Dr. Frank Petersen-Baez, was of the view that plaintiff was unable to bend over or sit for a long period of time. (Tr. 109).^{*} He concluded that Mr. Bruno was unable to work.^{**} Dr. Serafin Izquierdo, a chiropractor, was of the opinion that Mr. Bruno would progressively get worse. (Tr. 132).

The Administrative Law Judge declined to accept Dr. Petersen-Baez' opinion that the plaintiff could not sit for a long time "in view of the opinion of the orthopedist on June 10, 1974 and the lack of any reported worsening of the claimant's condition in the intervening time." (Tr. 16).

It cannot be disputed that the Administrative Law Judge was justified in accepting the view of Dr. Wise,

^{*} The differing opinions of Drs. Wise and Petersen-Baez appear to have been based on virtually identical X-ray reports. Dr. Petersen-Baez' summary of the X-ray findings that support his opinion (Tr. 109), dated December 10, 1974, is a direct quote from an X-ray report dated July 30, 1974 (Tr. 120), which also describes plaintiff's condition as "unchanged from January 31, 1974".

The earlier X-ray (actually dated January 30, 1974) (Tr. 114-15) is the only X-ray report in the record which would have been available to Dr. Wise for purposes of his June 10, 1974 opinion, and in fact bears Dr. Wise's signature on its second page. (Tr. 115). It contains observations virtually identical to those in the July X-ray report. (Tr. 114-15).

The X-rays relied upon by Dr. Izquierdo, the chiropractor, dated February 27, 1975, also contain observations reasonably leading to the conclusion that plaintiff's condition had not changed materially by that date. (Tr. 133).

^{**} A medical opinion that a man cannot work is not binding where, as here, there is contrary evidence. *Selig v. Richardson*, *supra*. See also *Lewis v. Weinberger*, 515 F.2d 584 (5th Cir. 1975).

an orthopedic surgeon, and rejecting the views of Dr. Petersen-Baez, an internist, and Dr. Izquierdo, a chiropractor. See *Durham v. Gardner*, 392 F.2d 168 (4th Cir. 1968); *Slone v. Richardson*, 325 F. Supp. 1116, 1119 (W.D. Va. 1971). Dr. Wise is an orthopedic specialist and was Mr. Bruno's treating physician at Hunts Point; he was not selected by the Secretary.

The Secretary's resolution of this conflict in the evidence, based on the firm opinion of a treating medical specialist, is within the discretion of the Secretary, and should not be disturbed on review. *Gotshaw v. Ribicoff*, 307 F.2d 840, 845 (4th Cir. 1962), cert. denied sub nom. *Heath v. Richardson*, 372 U.S. 945 (1963); *Ehrenreich v. Weinberger*, 397 F. Supp. 693, 696 (W.D.N.Y. 1975). An examiner is "fully entitled to single out and accord greater weight to those portions of the evidence which he considered particularly persuasive . . ." *Rivas v. Weinberger*, supra, 475 F.2d at 258.*

(b) Plaintiff's Complaints of Pain

The Administrative Law Judge's finding that plaintiff suffered from pain "from time to time but not of any greater severity than that experienced by him from 1966 to July 27, 1973 . . ." (Tr. 16), and that this pain was not disabling, is supported by substantial evidence.

Reports or complaints of pain naturally come from the suffering party, the claimant for disability benefits. The Secretary, however, is not bound by a claimant's

* It is particularly important that the examiner's judgment be given great weight as to credibility of witnesses and medical opinion where back injuries, which are not susceptible to easy evaluation, are involved. See *Remington v. Folsom*, 157 F. Supp. 473, 475 (N.D.N.Y. 1957).

self-serving statements, *Peterson v. Gardner*, 391 F.2d 208 (2d Cir. 1968); *Rolenaitis v. Richardson*, 336 F. Supp. 1235 (E.D. Pa. 1972), *aff'd*, 475 F.2d 1396 (3d Cir. 1973), and he need not credit a claimant's assertions of pain. *Deyo v. Weinberger*, 406 F. Supp. 968 (S.D.N.Y. 1975); *Cox v. Mathews*, 421 F. Supp. 721 (N.D. Cal. 1976). Moreover, not all pain is disabling:

While relatively constant severe pain may give rise to a disability, subjective symptoms of pain must be evaluated with due considerations for credibility, motivation and medical evidence of impairment. The fact that a person cannot work without some pain and discomfort does not satisfy the test for disability. *Cox v. Mathews*, 421 F. Supp. 721, 726 (N.D. Cal. 1976). See *Adams v. Flemming*, 276 F.2d 901, 904 (2d Cir. 1960).

Mr. Bruno's own actions demonstrate the futility of his burden of proving his pain disabling. He has not complained that his pain is of recent origin. Instead, he attributes all his ills to a construction accident which occurred in Puerto Rico on February 1, 1966. He claims that this accident has rendered him unable to perform certain activities. But for a 7-year period following his accident, plaintiff worked as a construction equipment operator; sugar cane cutter; lift operator in a factory and a warehouse; packer; loader, and general factory worker. All of these activities involved the same functions that plaintiff claims he is now unable to perform.

When did this malady attributable to the old injury arise? Plaintiff initially claimed that the onset of his disability occurred on July 27, 1973 (Tr. 67), the very day he was laid off. From that day to the present, plaintiff has not sought work. An inference can justifiably be drawn from his work history, to quote the Administrative Law Judge, that "[t]he claimant was not under a 'dis-

ability', as defined in the Social Security Act, *at any time* on or before the date of this decision." (Tr. 18). (Emphasis added.)

This inference is further supported by Mr. Bruno's admission that he suffered pain while working during the 7 years following his accident. (Tr. 78).

The logic of the Administrative Law Judge's determination that plaintiff's condition subsequent to his loss of work was exactly the same as that prior to July, 1973 is clear even to plaintiff, who admits:

In July, 1973, claimant was laid off from this employment. (Tr. 78). He chose to take advantage of the free time that resulted from the loss of his job to seek treatment for his back condition which prevented him from bending, climbing stairs, lifting heavy objects, and sitting and standing for long periods of time (Tr. 80), through his union's hospitalization program (Tr. 45). Brief for Appellant at 3-4.

* Since plaintiff's condition as of July 27, 1973 did not prevent him from working, and there is no evidence that plaintiff's back injury and the resultant pain worsened after he ceased work, it is only reasonable that the trier of the facts did not give full credit to plaintiff's testimony about the severity of his pain.*

*The Administrative Law Judge quoted the plaintiff as stating that he suffered headaches "almost all the time." (Tr. 15). The plaintiff states that no such claim was made and charges that "[t]he law judge . . . distort [the evidence]." Brief for Appellant at 20. In point of fact, the following testimony was adduced: "ADMINISTRATIVE LAW JUDGE: How often do you get headaches? MR. BRUNO: Very often, almost always." (Tr. 43). There was no distortion of the record. The Administrative Law Judge rendered his considered judgment based on a fair appraisal of the record, and his decision was upheld by Judge Carter.

In an analogous case where a claimant worked for a period of time under an impairment he later claimed to be disabling, the Court found significant the total absence of evidence showing that the quality of his work suffered over the years.

Where the burden is upon the plaintiff to establish his case, it would be expected that the record would be replete with testimony from various employees or officers of the Company that plaintiff because of his sinus condition had been absent from the office for protracted periods, that the quality of his work had suffered, that he was unable to carry on his duties and for this reason he or the Company had suggested retirement. *Adams v. Flemming*, 276 F.2d 901, 903 (2d Cir. 1960).

In this case, the record is barren of any such evidence, and plaintiff had to be told that he was disabled by a doctor before he became motivated to seek disability benefits.

Mr. Bruno worked at hard, physical labor jobs for 7 years after his accident. His condition did not deteriorate thereafter. He left work because he was laid off, not because of his condition. He did not look for work thereafter.

If a claimant has worked with an alleged impairment over a period of years and there has been no significant deterioration in that impairment, he cannot claim it to be disabling. See *Johnson v. Finch*, 437 F.2d 1321 (10th Cir. 1971) (clubfoot); *King v. Gardner*, 370 F.2d 652 (6th Cir. 1967) (epilepsy); *Adams v. Flemming*, *supra*.

The Secretary's decision that Mr. Bruno suffered some pain, but no more than he had while he worked for 7 years after his accident and therefore not enough to dis-

able him, is thus supported by substantial evidence and should be affirmed. See *Lancaster v. Gardner*, 293 F. Supp. 1187 (E.D. Va.), *aff'd*, 404 F.2d 1385 (4th Cir. 1968).*

D. The Vocational Testimony

Since the claimant did not carry his burden of proof, having failed to show that the record contains no evidence of his ability to engage in substantial gainful activity, *Menses v. Secretary of HEW*, *supra*, *Gray v. Matthews*, *supra*, the Secretary was not required to show other substantial gainful activity that the plaintiff was capable of performing, and the vocational testimony in this case was unnecessary.**

Assuming *arguendo* that the vocational testimony was necessary, there is substantial evidence in the record to support the Secretary's conclusion that there are many jobs in the New York City area within the plaintiff's capabilities.

The Administrative Law Judge found that the plaintiff was not disabled by pain, and that he had the following limitations: he could not lift more than 25 pounds,

* Plaintiff also claims to suffer from heel pain, which he first reported in December, 1974. The pain was successfully treated with injections in January, 1975, and was not mentioned in the report of plaintiff's treatment on February 14, 1975. Mr. Bruno did not consider it important enough to mention it at the hearing. An impairment cannot constitute the basis of a finding of disability unless it is non-remediable and will preclude substantial gainful activity for at least 12 months. 42 U.S.C. § 405(g).

** Vocational expert testimony is not always required. An examiner can make his own findings about available jobs. *McLamore v. Weinberger*, 538 F.2d 572, 575 (4th Cir. 1976).

bend more than a few degrees, or stand for more than one hour, although he could sit for an unlimited period of time provided that he could stand up from time to time to relieve any discomfort in his back. (Tr. 16).

The vocational expert, Dr. Fishman, testified at the hearing that there were many jobs within the plaintiff's capabilities, such as assembler of small products, packer, trimmer, machine operator, and inspector, to mention a few. (Tr. 17). The expert testified that for many of these jobs, claimant could assume a sitting position on a stool, for example, at an assembly line, and carry out his duties in a satisfactory manner without straining his limitations. The Administrative Law Judge found that this testimony was not successfully controverted, and adopted it as part of his findings.

It is noteworthy that plaintiff worked as a packer prior to his claim of disability. Since the evidence shows that his physical condition has not changed, this vocational testimony demonstrates that Mr. Bruno could actually find employment in a familiar capacity. It also supports the conclusion that given the dysfunctions found by the Administrative Law Judge, the plaintiff could still work at his last job.

The reasonableness of the Secretary's findings has further support in Mr. Bruno's age. He is 36 years old. The Administrative Law Judge (and the expert) took age into consideration, and appropriately so. "Naturally, the courts cautiously scrutinize the employment prospects of so young an individual before placing him on the disability rolls." *McLamore v. Weinberger*, 538 F.2d 572, 574 (4th Cir. 1976) (Age of Claimant: 30).

POINT II

The Court Below Did Not Err In Finding That The Secretary's Decision Was Based Upon an Examination Of The Whole Record.

Plaintiff argues that the decision of the court below should be reversed because the Administrative Law Judge failed to consider the whole record. Specifically, Mr. Bruno claims the Administrative Law Judge failed to consider the evidence of pain, and Mrs. Bruno's testimony regarding her husband's dysfunctions.

The Administrative Law Judge gave due consideration to the extent of the plaintiff's pain. The fact that his opinion did not discuss each and every report of the plaintiff's assertions of pain is hardly grounds for reversal; if the Administrative Law Judge were required to deal specifically with each piece of evidence, his decision would be longer than the record itself.

The plaintiff's citation of this Court's opinion in *Carnevale v. Gardner*, 393 F.2d 889 (2d Cir. 1968), for the proposition that the Administrative Law Judge ignored important evidence is most inapt. In *Carnevale*, the Administrative Law Judge ignored the fact that the claimant had undergone major surgery (vagotomy and antrectomy for a duodenal ulcer). Here the Administrative Law Judge weighed the issue of the extent of pain, and on the basis of substantial evidence in the record, found that plaintiff indeed suffered some pain but was not disabled. Mr. Bruno's real complaint here is not that the Administrative Law Judge ignored the issue of pain, but that he found in the Secretary's favor. It is within the sole province of the Secretary to make such findings, *Dolan v. Celebrezze*, *supra*; *Kerner v. Celebrezze*,

supra. The plaintiff has failed to apprehend the difference between ignoring important evidence, as in *Carnevale*, and simply reaching one of two arguably supportable conclusions. The former results in reversal, but the latter must be affirmed. *Howard v. Weinberger, supra*; *Selig v. Richardson, supra*.

As to Mrs. Bruno's testimony, her evidence consisted of the assertions that she helped her husband dress and usually accompanied him when he went out, to help him over snow and ice, and that he complained of pain and dizziness. (Tr. 61-63). This testimony raises nothing new, and is cumulative of the claimant's assertions of disability. As such, the Administrative Law Judge is hardly required to deal with it in detail.

Mr. Bruno also accuses the Administrative Law Judge of having distorted the evidence. Brief for Appellant at 20. The allegation regarding distortion of the record as to the plaintiff's headaches has been disposed of above. See footnote on p. 21, *supra*. The accusation that the administrative Law Judge distorted X-ray findings is equally baseless. Plaintiff quotes the Administrative Law Judge's finding with respect to the January 30, 1974 X-ray (Tr. 114), and states that the Administrative Law Judge distorted the X-ray report because he did not quote it in full. The Administrative Judge reported that the X-ray showed a marked narrowing of the disc space, and that Dr. Wise diagnosed a healed compression fracture. The Administrative Law Judge did not quote a reference to osteophytic bridging of the margins of the vertebral bodies, which was considered by Dr. Wise in his diagnosis. (Tr. 139). Furthermore, the later X-ray, which also refers to osteophytic formation, actually states that the plaintiff's condition was unchanged from the January X-ray (Tr. 120), a fact which *was* noted by the Administrative Law Judge (Tr. 16). With minor variations in terminology, these later X-rays report the same

information reported in the January X-ray. The fact that the Administrative Law Judge did not quote all X-ray reports in full hardly amounts to distortion of the record.

POINT III

The District Court Did Not Err In Finding Substantial Evidence For The Secretary's Finding That Substantial Gainful Activity Is Available For Plaintiff.

Mr. Bruno's brief asserts that Judge Carter erred in finding that the Secretary had shown substantial gainful activity within plaintiff's limitations. Plaintiff alleges three errors on the part of the Administrative Law Judge: (A) he erroneously summarized the evidence for the vocational expert; (B) he did not permit the expert to consider the whole record; and (C) he did not permit the expert to consider pain.

A. Summary of the Evidence

The Administrative Law Judge asked the vocational expert, Dr. Fishman, two hypothetical questions. First, assume that plaintiff's allegations are all true: can he work? Dr. Fishman said no. Second, assume the following dysfunctions: plaintiff must wear a back brace, must alternate sitting and standing at will, and cannot do any work "requiring bending or stooping while lifting more than 15 pounds." Can he work? Dr. Fishman answered that he could, and listed several sedentary jobs plaintiff could perform. (Tr. 52-53).

In suggesting an inability to bend or stoop while lifting more than 15 pounds, the Administrative Law Judge

misstated the evidence.* The Secretary's position is that this was harmless error.

Mr. Bruno raised this point for the first time in the District Court. Plaintiff was represented at the hearing by Mr. Bowers, who has represented him throughout this proceeding and demonstrated himself to be competent and familiar with the facts. Mr. Bowers did not object to the examiner's mistake at the hearing, nor did anyone else present. In fact, the testimony that followed this slip contains no reference to a dysfunction preventing stooping while lifting more than 15 pounds, but rather proceeds as if the examiner had stated Dr. Wise's finding accurately. In short, the Administrative Law Judge may have misstated the evidence, but those present missed it and proceeded as if he had made the correct statement. The jobs cited by Dr. Fishman *are* within Mr. Bruno's range under the limitations found by Dr. Wise, in that they do not require bending or stooping, or lifting more than 25 pounds.

The cross-examination of Dr. Fishman by plaintiff's counsel focused not on plaintiff's ability or inability to stoop *while* lifting, but to stoop (or bend) at all. (Tr. 56-61). Counsel appeared to argue that all the jobs cited involved bending to some degree, and that therefore Dr. Fishman's testimony regarding such jobs was invalid. This argument presupposes that plaintiff could not bend at all, and makes sense only if counsel—and Dr. Fishman—apprehended the Administrative Law Judge's hypothetical to rule out bending or stooping, and also lifting more than 25 pounds (*i.e.*, the correct formula).

* At 3 P.M. on February 25, 1977, after this brief had been sent to the printer counsel for the Secretary learned that p.52 of the transcript was mistranscribed and that in fact the Administrative Law Judge correctly summed up Dr. Wise's findings in hypothesizing that plaintiff could not bend *or* stoop *or* lift more than 25 pounds. Counsel will provide the court and opposing counsel with the correct certified page as soon as possible.

Plaintiff's counsel first focused on the fact that conveyor-belt jobs involve stable levels for a work surface. (Tr. 57). He then observed that if plaintiff were to alternate standing and sitting, he would have to bend over. (Tr. 58). He did *not* say that the plaintiff would have to bend over *and* lift more than 15 pounds. He extracted from the witness the admission that while standing, the plaintiff "would bend over a little more, that's correct" (Tr. 58) and concluded his examination. The Administrative Law Judge then asked for a distinction between "bending" and "stretching", with no mention of lifting (indicating that he, too, thought he had correctly stated Dr. Wise's findings) (Tr. 59). The witness replied that literally speaking, any stretching involved flexion, or bending, of the spine (he, too, was preoccupied with the single issue of bending). (Tr. 60).^{*} Mr. Bowers then posed more questions about the height of working surfaces. (Tr. 60-61). Not a word was said by anyone about stooping *while* lifting.

Thus the Administrative Law Judge's error was harmless, in that no one noticed it, and the witness testified (and counsel cross-examined) on the basis of the true evidence.^{**}

^{*} In this connection, plaintiff states that Dr. Wise's report unqualifiedly opines that the plaintiff cannot bend or stoop at all. (Brief for Appellant at 29). This is not true. Dr. Wise states that plaintiff "shouldn't" "bend or stoop in repetitions." (Tr. 95). He also found that plaintiff can lift up to 25 pounds, which obviously involves a small degree of stretching or bending in the purest sense. The jobs cited by Dr. Fishman are consonant with a few degrees of bending, which is what the Administrative Law Judge ultimately found plaintiff capable of doing.

^{**} Mr. Bowers' post-hearing letters of April 3, 1975 to the Administrative Law Judge (Tr. 137) and of April 23, 1975 to the Appeals Council (Tr. 9-11) made no reference to this error.

This error is further seen to be harmless in light of the fact that the jobs cited by Dr. Fishman do not involve major lifting, and only a few degrees of bending: the kind of bending one does in reaching for a can of shaving cream. These jobs are clearly within plaintiff's capabilities.

Most importantly, the Administrative Law Judge ultimately found that plaintiff's present condition is no worse than it was when he worked as a packer, one of the specific positions which the vocational expert testified existed in the area. Had the expert's testimony consisted solely of the availability of work as a packer, the Administrative Law Judge, based on the four corners of the record before him, could have found that plaintiff had the qualifications and physical ability to perform that job. The error, if any, does not warrant a remand for the purpose of asking a question which would have no bearing on the testimony adduced or the result reached.

B. The Whole Record

The Administrative Law Judge, not the expert, is the fact-finder. Thus the expert must consider only the evidence which the Administrative Law Judge wants him to consider.

Further, in this case, the Administrative Law Judge *did* ask the expert to consider the entire record. The expert read all the exhibits (Tr. 51), heard all the testimony, and answered in the negative when the Administrative Law Judge asked him if he needed more facts. (Tr. 52).

The entire purpose of having a vocational expert is to enable the Administrative Law Judge to reach conclusions based on the portions of the record which

he finds persuasive: to define the parameters within which he may make findings. To restrict the expert's answers to hypotheticals based only on the whole record would utterly frustrate this purpose, and is not within the authority of any of the cases cited by plaintiff.

The absurdity of this argument is highlighted by plaintiff's statement "... Dr. Fishman confirmed that ... he had in fact ignored the claimant's medical record ..." (Brief for Appellant at 32). This is inaccurate. Dr. Fishman on instructions omitted only "subjective reports of pain and discomfort." (Tr. 57).

Finally, plaintiff's assertion that failure to hear Mrs. Bruno's testimony before giving his opinion prejudiced the expert's testimony is desperate and unfounded. *Mullins v. Cohen*, 408 F.2d 39 (6th Cir. 1969), relied upon by plaintiff (Brief for Appellant at 32), refers to *medical* reports; Mrs. Bruno's testimony, which was at any rate duplicative, was hardly a medical report such as was contemplated in *Mullins*.

Moreover, counsel should have raised his objection to the order of testimony at the administrative hearing. The order of witnesses was not prejudicial to plaintiff's position as advanced at the hearing and did not influence the outcome of the proceeding.*

C. Disregard of Pain

As noted above, the question of pain for the Administrative Law Judge to decide. If—as was the case here—the Administrative Law Judge found the plaintiff's pain to be less than disabling, it would make little

* Nothing prevented plaintiff's counsel from framing his own hypothetical questions to the expert taking into account Mrs. Bruno's anticipated testimony.

sense to insist that the vocational expert take into account evidence which the Administrative Law Judge finds unpersuasive.

POINT IV

The Secretary Did Consider The Combined Effect Of Plaintiff's Various Complaints, And The Decision Of The District Court Should Be Affirmed.

Mr. Bruno's argument that the Administrative Law Judge considered only certain ailments is contradicted by the latter's own opinion. (Tr. 14). The Administrative Law Judge gave careful consideration to the entire record, and in fact ensured that the vocational expert was also familiar with all the exhibits and testimony, and then found that "... [t]he claimant was not prevented by his impairments from engaging in substantial gainful activity..." (Tr. 18) (emphasis added). It is further clear from the Administrative Law Judge's set of hypothetical dysfunctions posed to the vocational expert that he was giving due consideration to the cumulative effect of the plaintiff's problems. (Tr. 52).

Reduced to its essence, the case is this: plaintiff sustained a back injury in 1966, from which he recovered sufficiently to work at hard labor jobs for the next 7 years. He was laid off, began to collect unemployment * and did not look for work again, but entered a hospital four months after being laid off, complaining of back pain. After several months of medical treatment, he had added several other complaints, and claimed to be virtually immobilized. His arguments on appeal are founded on his disappointment in the Administra-

* It is noteworthy that to collect unemployment insurance in New York State, a would-be recipient must state that he is able to work, report regularly for employment counseling, and accept and follow up employment references, N.Y. Labor Law §§ 590(1), 591(2), 596(2) (McKinney 1965).

tive Law Judge's determination that he is not disabled within the meaning of the law. But disappointment in and disagreement with the Secretary's decision are not grounds for reversal, and the clear substantial evidence in the record for the Secretary's findings urges affirmance of Judge Carter's decision. *Richardson v. Perales, supra*; *Kerner v. Celebreeze, supra*; *Levine v. Gardner, supra*.

CONCLUSION

It is submitted that the Secretary's determination is supported by substantial evidence and the decision of the District Court should therefore be affirmed.

Dated: New York, New York
February 28, 1977

Respectfully submitted,

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ADDENDUM

Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
75 Civ. 5183

JOSE BRUNO,

Plaintiff,

—against—

DAVID MATHEWS, Secretary of Health, Education
and Welfare,

Defendant.

APPEARANCES:

Bronx Legal Services Corp. Co.
579 Courtlandt Avenue
Bronx, New York 10451
by John Bowers, Esq.
Attorneys for Plaintiff

Hon. Robert B. Fiske, Jr.
United States Attorney for the
Southern District of New York
by Louis G. Corsi,
Assistant United States Attorney
Attorneys for Defendant

Plaintiff seeks a review of the final determination by the Secretary of Health, Education and Welfare denying his application for disability insurance benefits. Plaintiff alleges in his application that he has been unable to work since November, 1973. His application was filed on March 22, 1974, denied initially, and after an indepen-

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dent review, the Bureau of Disability Insurance of the Social Security Administration reached the same conclusion. At plaintiff's request, a hearing *de novo* was held before an administrative law judge on March 28, 1975. At that hearing plaintiff was represented by counsel, an interpreter was present and plaintiff, his wife, and a vocational expert testified. On April 9, 1975, the administrative law judge found that plaintiff was not under a disability.

The administrative law judge's findings are clear, precise and based upon an examination of the whole record. He found that plaintiff had discontinued work on July 27, 1973, because of lack of work and not due to any physical impairment. He found no evidence that plaintiff's high blood pressure which produced readings near normal on June 14 and July 29, 1974, and March 14, 1975, had created complications in the heart, brain, kidneys or eyes, a necessary prerequisite to determination of disability for hypertension. He also found that plaintiff suffered from diabetes mellitus but found no report of any resultant complications associated with a severe and disabling diabetic condition such as neuropathy, acidosis or ophthalmologic impairment. In reference to plaintiff's claim of back impairment, the administrative law judge found that plaintiff had sustained injury to his spine in 1966, and had suffered intermittent low-back pain thereafter; that he had been treated for that injury since January 30, 1974, at Hunt's Point Multi-Service Center; that on June 10, 1974, plaintiff's treating orthopedist was of the opinion that plaintiff could sit for an unlimited period of time, stand one hour and lift up to 25 pounds, forward bending and weight lifting were restricted; and that there had been no showing that plaintiff's condition had worsened since the orthopedist's opinion had been rendered.

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The vocational expert testified that based on plaintiff's age, education, training, experience, and on the assumption that he could not do any work requiring him to bend or stoop or lift more than 15 pounds, Bruno could work where he could alternate between standing and sitting. The expert testified and specified that there was a wide variety of jobs in the New York area which fitted that specification and which a claimant with plaintiff's impairment could perform.

Based on his findings and the testimony of the vocational expert, the administrative law judge concluded that plaintiff had not established that he was under a disability. The Appeals Council having considered additional evidence submitted by plaintiff, approved that decision on June 27, 1975, making the administrative law judge's determination the final decision of the Secretary.

Plaintiff moves for judgment on the pleadings. The government moves to amend its answer to correct certain inaccuracies and supply certain omissions in the transcript of the record. The government cross-moves for summary judgment. The government's motions to amend its answer and for summary judgment are granted; and plaintiff's motion for judgment on the pleadings is denied.

DECISION

The scope of review of the Secretary's findings available to a court under 42 U.S.C. § 405(g) is limited to determining whether the findings are supported by substantial evidence. *Levine v. Gardner*, 360 F.2d 727 (2d Cir. 1966). If so supported, the Secretary's findings are conclusive and cannot be disturbed. *Richardson v.*

Opinion

Perales, 402 U.S. 389 (1971). Conflicts in the evidence must be resolved by the Secretary, not by the courts. *Gotshaw v. Ribicoff*, 307 F.2d 840, 845 (4th Cir. 1962), cert. denied, sub nom. *Heath v. Celebrezze*, 372 U.S. 945 (1963). A disabling physical impairment within the meaning of the Social Security Act must be such as to deprive the claimant of the capacity to engage in any substantial gainful activity, see, e.g., *Blalock v. Richardson*, 483 F.2d 773, 775 (4th Cir. 1972), and the claimant has the burden of establishing that he has such a physical or mental impairment which has prevented him from engaging in any substantial gainful activity and that this impairment has lasted or is expected to last for a continuous period of at least twelve months. *Franklin v. Secretary of HEW*, 393 F.2d 640, 642 (2d Cir. 1968).

The record does reveal that certain doctors were of the opinion that plaintiff was disabled and could not work, but the Secretary need not accept a physician's conclusions, *Torres v. Secretary of HEW*, 333 F. Supp. 676, 679 (D.P.R. 1971). Here, after examining all the medical evidence, it was determined that the findings of plaintiff's treating orthopedist was more reliable. Since there is substantial evidence to support that resolution of the conflicting medical opinion, it is a valid determination for the Secretary to make and cannot be disturbed. *Richardson v. Perales*, *supra*.

Accordingly, the government's motion for summary judgment must be granted.

IT IS SO ORDERED.

Dated: New York, New York
October 8, 1976

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ROBERT L. CARTER
U.S.D.J.

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Carl T. Solberg being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
28th day of February 19 77 he served ~~a~~ copy of the
within Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

John Bowers
Bronx Legal Services, Corp. C.
579 Courtlandt Avenue
Bronx, New York 10451

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

1st day of March, 19 77

PAULINE P. TROLA
Notary Public, State of New York
No. 31-453231
Qualified in New York County
Commission Expires March 30, 1978

